

DEC 30 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:) Examiner: Rachel L. Porter
Edward J. Petrus)
Serial No. 09/444,660) Group Art Unit: 2166
Filed: November 22, 1999)

For: Dietary Supplement Selector and Method

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

REPLY BRIEF ON APPEAL

Applicant/Appellant, Edward J. Petrus, presents this Reply Brief, to deal with the basic errors contained in the Examiner's Brief and thereafter with the specific matters which seem in most urgent need of correction.

(4) Status of Amendments

The examiners erred when stating that the amendments provided after-final response (filed 2/8/05) did not overcome the written description rejection provided under 35 U.S.C. § 112, 1st ¶. (Pg. 3, lines 12-14).

On 2/8/05 during a telephone conference the following was agreed to by the examiners:

"Discussed claim rejections under 112, 1st paragraph and 112, 2nd paragraph and proposed amendments to overcome these claim rejections. Examiners indicated that the removal of the phrases "other items covered by the questionnaire" and "other nutritional supplements" from steps c) and d) of claim 1 should be sufficient to overcome the 112, 2nd paragraph rejections of claims 1-5 provided in the Final Rejection mailed 12/22/04. Examiners also indicated that removal of the phrase "for differences in" in the comparing step (c) of claim 1 should be sufficient to overcome the rejection of claims 1-5 under 112, 1st paragraph provided in the Final Rejection mailed 12/22/04."

See Evidence Appendix #1. The claims were amended as stipulated in the Interview Summary and filed on 2/8/05 as a Response to Rejection after Final. See Evidence Appendix #2. The status of amendments is as stated in the Brief on Appeal filed 11/11/05, that the amendments submitted on 2/8/05 overcame the § 112, 1st and 2nd paragraph objections and left pending the § 103 rejection.

This is but another example of the examiners agreeing to specific amendments during a telephone conference and changing their mind at a later date. This time the examiners put the

agreement in writing prior to changing their minds. The documentation supports the applicants position. In the Brief on Appeal, issue #9 of page 12, I discussed the frustration of having the examiners agree to amendments only to have them send a written rejection when they responded three months later. This action by the examiners is a violation of trust, and places the applicant in a position of amending the claims while not receiving the agreed benefits.

(6) Grounds of Rejection to be reviewed on appeal.

The examiners erred in stating in (A) whether the claims 1-5 comply with adequate written description requirement under § 112, 1st paragraph. As stated above, this objection was overcome with amendments to the claims on 2/8/05. See Evidence Appendix #1 and #2.

The only issue to be reviewed is whether claims 1-5 are patentable over Summerell et al (USPN 5,937,387) in view of Riley (USPN 5,976,568).

(9) Grounds of Rejection

(A) Claim Rejections - 35 USC § 112

The examiners erred in maintaining that claims 1-5 were rejected under 35 U.S.C. § 112, 1st paragraph, (Pg 5) even though this objection was overcome on 2/8/05. The examiners now claim that "the originally filed disclosure does not describe, 'comparing in (sic) the individual's health information to standardized profiles... to achieve optimal health and wellness.'" (Pg. 5, lines 12-16. In fact, applicant's original description (Pg. 2, lines 12-19), stated "questionnaire...information is entered and stored in the computer database 2, where it is compared to a health profile for a person of the consumer's age and health history background. Based on this comparison, a dietary supplement profile 3 can be generated that calculates the consumers personal nutritional needs of vitamins, minerals, amino acids, enzymes, herbs and other nutritional supplements to achieve optimal health and wellness."

The examiners erred in alleging that the "original disclosure lacks an adequate written description of the claimed invention" when referring to comparing "the individual's health information with standardized profiles" "with past profiles to determine any changes in nutritional (sic) status." (Pg. 5, lines 17-22). As stated in appellant's original description (Pg. 4, lines 17-18) "The profile can also show a comparison with past profiles to determine changes in nutritional status." The comparison was adequately described, but the word nutritional was misspelled. The examiners conclusion was without any basis in fact and vague in context.

The examiners NOTE (Pg. 6, lines 8-10) is without foundation and confusing.

(B) Claim Rejections - 35 USC § 103

Contrary to the opinion of the examiners, the only question before the Appeals Board is whether it would have been obvious to one of ordinary skill in the art, working with Summerell (USPN 5,937,387) in view of Riley (USPN 5,976,568) before him, could invent a method/process of creating a dietary supplement profile for an individual, after completing a health questionnaire (1*) and comparing the questionnaire information by an individual to a health profile for a person of the individual's age and health history background in a computer data base (2*), comparing for differences in the individual's health information to standardized profiles based on age, sex, physical activity, dietary habits, past medical history to achieve optimal health and wellness, and generating a computer-implemented dietary supplement profile (3*) listing the vitamins, minerals, amino acids, enzymes and herbs suggested to achieve optimal health and wellness.(Claim 1) . The invention further comprises incorporating the information provided by a physical examination (5*) and laboratory studies (6*) to refine the health profile.(Claim 2 & 3) The invention also provides a list of commercial products (4*) that provide the dietary supplements listed to achieve optimal health and wellness.(Claim 4) And finally by adding a plan for weight management. (Claim 5).

*refer to Figure 1 of the patent application.

The examiners erred regarding claim 1 (Pg. 7, lines 1-2) in stating that "Summerell et al teach a method for creating a dietary supplement profile for an individual." Summerell makes no reference to creating a dietary supplement profile, but in the abstract mentions "[a] System and Method for Developing a Customized Wellness plan for measuring a user's wellness by determining a user's physiological age." See Brief on Appeal (Pg. 3 & 4, 11/11/05), Examiner's modification of Summerell.

The examiners erred in stating (Pg. 7, lines 5-7, 10) that Summerell "comparing the information gathered from the questionnaire to health standard information for a person of the individual's age and health history background (col 8, line 30-41)." Summerell, (col 8, lines 30-41) refers to a description of Fig.1, which is included in Evidence Appendix #3. Contrary to the examiners comments, the algorithm of Fig. 1 is for subscription authentication, not for a dietary supplement profile.

The examiners erred in stating (Pg. 7, lines 14-17) that Summerell "teach a method and system for providing a dietary supplement profile for an individual in which information from an individual's questionnaire is compared to health standard information based on individuals of

comparable age, gender and other health risks including physical activity. (Col 11, lines 18-29)" No such dietary supplement profile is mentioned, but the calculation of physiological age.

Summerell states that "An object of the present invention [is] to provide a system that counsels individuals in a meaningful way to adopt and maintain healthy behaviors" (Col. 2, Lines 57-59) considering such issues as: driving while intoxicated, eating between meals, education level of spouse, firearms, helmet use, parent's divorce, safety belt use, social contacts, suicide attempt, traffic tickets..." "among others in the calculation of physiological age." (Col 3, lines 18-41).

The examiners erred with the statement (Pg. 8, lines 17-19) that "Riley teaches a method that compares the individual's health profile compared to a standard health profile, adjusting for differences and generates a dietary supplement profile based on the individual's health information." In fact, Riley teaches a method of providing seven (7) different multi-vitamin and mineral coated tablets. (Col. 4, lines 44-67; Col. 5, lines 1-21). In Riley, there is no mechanism for determining what vitamin or mineral deficiencies exist, nor is there any system/method of determining which of the seven multi-vitamins to take. Riley does not use any health questionnaire, nor does it generate any health profile. Riley has five (5) claims that only outline the multi-vitamin compositions.

The examiners erred regarding claim 2 alleging (Pg. 9, lines 11-13) that Summerell "teach a method wherein the step of comparing further comprises the adding information provided from a physical examination." As the invention is defined by the language in the claims, a review of the 38 claims of Summerell and the 5 claims of Riley, no reference is made to using data from a physical exam to achieve any dietary supplement profile. Applicant's invention differs from Summerell and Riley in that it "can be further individualized by supplementing information provided by a physical exam which allows the practitioner to input data such as blood pressure, pertinent physical and emotional findings, current medications, body fat analysis, and any contraindications to dietary supplements." (Application Pg 3, lines 13-15).

The examiners erred regarding claim 3 (Pg. 10, lines 3-5) when stating that Summerell "further comprises adding information provided by laboratory studies." Summerell makes no claim to obtaining laboratory studies for calculating physiological age. Applicant's invention, in contrast, incorporates laboratory studies to provide additional insight into the consumer's health status. "Laboratory studies that could be input into the database by example comprise: complete blood count and urinalysis, automated blood analyses, serum vitamin levels, hair analyses or essential metabolic analysis for nutritional assessment testing." (Application Pg 3, lines 15-19).

The examiners erred regarding claim 4.(Pg. 10, lines 14-21) in stating that "Summerell et al teach a method that also includes adding a list of commercially available products that provide the dietary supplements listed in an optimal health profile." The applicant's invention clearly distinguishes over the reference to Summerell, which recommends the same amount of vitamin C, vitamin E and folate as in a one-size fits all vitamin tablet, provides no feedback to modify the amount of vitamins, and makes no reference to other vitamins, minerals, amino acids, enzymes or herbs. Summerell offers no computer-controlled feedback loop by which the consequences of an event send back data that in turn modify that event in the future. Riley teaches a method of providing seven (7) different multi-vitamin and mineral coated tablets. (Col. 4, lines 44-67; Col. 5, lines 1-21). In Riley, there is no mechanism for determining what vitamin or mineral deficiencies exist, nor is there any system/method of determining which of the seven multi-vitamins to take. Riley does not use any health questionnaire, nor does it generate any health profile. Riley has five (5) claims that outline the multi-vitamin compositions. Applicant's invention "can be further defined into commercially available products, for both the convenience of the consumer or for the benefit of the commercial provider." (Application Pg. 2, lines 20-22).

(10) Response to Argument

(A) Examiners erred in stating (Pg. 11, lines 11-18) that "Claims 1-5 were also rejected under 35 U.S.C. 112, 1st paragraph. The Appellant did not address this rejection in the Appeal Brief filed on 11/11/05."

See Evidence Appendix #1. The claims were amended as stipulated in the Interview Summary and filed on 2/8/05 as a Response to Rejection after Final. See Evidence Appendix #2. The status of amendments is as stated in the Brief on Appeal filed 11/11/05, that the amendments submitted on 2/8/05 overcame the § 112, 1st and 2nd paragraph objections and left pending the § 103 rejection. This is but another example of the examiners agreeing to specific amendments during a telephone conference and changing their mind at a later date. The documentation supports the applicant's position.

(B) The examiners are disingenuous in responding to applicant's claim that they modified the Summerel reference by claiming that it taught a method for creating a dietary supplement profile. (Pg. 12, lines 1-9). On Pg. 7, lines 1-2 the examiners claim that "Summerell et al teach the method for creating a dietary supplement profile for an individual."

In their new response they now classify Summerell as developing a customized wellness

plan and to allow the user to implement the customized wellness plan. (Pg. 12, lines 1-9). Which is it? Is Summerell, a wellness plan or a method for creating a dietary supplement profile?

The CCPA and the Federal Circuit has consistently held that when a § 103 rejection is based upon a modification of a reference that destroys the intent, purpose or function of the invention disclosed in the reference, such a proposed modification is not proper and the *prima facie* case of obviousness can not be properly made. See *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). The use of Summerell as a basis for rejection under 35 U.S.C. § 103(a) is inappropriate and not based on the facts of this application.

(C) The examiners objected to applicant's argument that his invention distinguishes over Summerell and Riley. The examiners erred by maintaining that Summerell provides a dietary supplement profile and refer to Figures 18-25 to support their position.

The examiners misread Summerell. Figures 18 through 21 present selections for a wellness planner. In Figures 18 - 19, one selects from five recommendations to improve one's physiological age. See Evidence Appendix #4 & #5. If one selects to stop smoking, reduce cholesterol and take vitamin C, folic acid and vitamin E, then a wellness planner is generated, such as Figure 22. See Evidence Appendix #6. This is not a dietary supplement profile. A dietary supplement profile lists different vitamins, minerals and nutrients to achieve optimal health and wellness, based on the information provided by the health questionnaire, and information provided by a physical examination and laboratory studies. See Evidence Appendix #7, Figure 2 from the application.

The examiners erred in claiming (Pg. 13, lines 7-12) that "[t]he secondary reference, Riley, was relied upon to teach a dietary supplement profile that includes vitamins, minerals, and herbs based on the individual's health information."

Contrary to the examiners comments, Riley teaches the production of seven (7) different multi-vitamin and mineral coated tablets. (Col. 4, lines 44-67; Col. 5, lines 1-21). In Riley, there is no mechanism for determining what vitamin or mineral deficiencies exist, nor is there any system/method of determining which of the seven multi-vitamins to take. Riley does not use any health questionnaire, nor does it generate any health profile. Riley has five (5) claims that only outline the multi-vitamin compositions.

The examiners erred in discussing the test for obviousness. (Pg. 13, lines 16-22).

First, if a § 103 rejection is based upon a modification of a reference that destroys the intent, purpose or function of the invention disclosed in the reference, such a proposed modification is not

proper and the *prima facie* case of obviousness can not be properly made. See *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

Second, the suggestion or motivation to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Third, the Court *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988) found that the PTO had not established a *prima facie* case of obviousness and that the references were improperly combined, using hindsight reconstruction, without evidence to support the combination and in the face of contrary teachings in the prior art. The Court noted:

Obviousness is tested by "what the combined teachings of the references would have suggested to those of ordinary skill in the art." *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). But it "cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination. *ACS Hosp Sys. v. Montefiore Hospital*, 732 F.2d at 1577, 221 USPQ at 933 (Fed. Cir. 1984). And "teachings of references can be combined *only* if there is some suggestion or incentive to do so." *Id.* Here, the prior art contains none.

There is no suggestion or incentive to combine the teaching of Summerell with Riley. Accordingly, even if all elements of a claim are disclosed in various prior art references, the claimed invention taken as a whole cannot be said to be obvious without some reason given in the prior art why one of ordinary skill would have been prompted to combine the teachings of the references to arrive at the claimed invention. See *In re Regal* 188 USPQ 132 (CCPA 1975).

(D) The examiners erred in not recognizing that Riley teaches away from the appellant's invention. (Pg. 14, lines 4-20, pg. 15, lines 1-7).

Riley teaches that "[t]he use of laboratory methods to assess nutritional status, which includes blood and tissue levels of vitamins and their effects (A, C, E, D, etc) on various enzyme systems (B1, B2, B6), is often considered the most reliable method of assessing nutritional status, though these special testing procedures are expensive and do not exist in standard medical offices or in many hospital clinical laboratories (Col. 2, lines 42-49). Riley goes on to state that "certified nutrition assessments, the expenses involved, and the time required to conduct necessary history taking, physical examination and appropriate laboratory testing, it is apparent that consumers are forced into making their own nutrient supplement choices." (Col. 2, lines 62-66).

Riley has five (5) claims that outline the multi-vitamin compositions. The health

questionnaire, lab studies and physical exam used in the applicant's invention are taught away by Riley. The Supreme Court held in *United States v. Adams*, 383 U.S. 39, 148 USPQ 497 (1966) that one important indicium of nonobviousness is "teaching away" from the claimed invention by the prior art, and that the prior art's teaching away was held to prevent a purported § 103 rejection.

In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988), the Court held that one of the references (Eads) "diverge from and teach away from the invention at hand" as does the Riley reference in the instant application. The Court held that neither reference alone or in combination, suggested the claimed invention.

(E) The examiners erred in maintaining that in claim 4 that Summerell et al teach providing a list of commercially available products that provide the dietary supplements listed in an optimal health profile. (Pg. 15 & 16).

The term "optimal health profile" was not used by the appellant in the original application, not by Summerell or Riley, but one encouraged by the examiners during a telephone conference on 5/29/02. This was the term the BPAI objected to since it was not mentioned in the specifications.

(F) The examiners objected to the appellant's argument that the examiners changed the rejection grounds from a § 102 rejection for anticipation under Summerell to a § 103 rejection for obviousness when Summerell was combined with Riley. (Pg. 16). Appellant then argued that such action by the examiners violate MPEP § 706.07, which states that going "from one set of references to another by the examiner in rejecting in successive actions claims of substantially the same subject matter, will alike tend to defeat attaining the goal of reaching a clearly defined issue for an early termination, i.e., either an allowance of the application or a final rejection."

The first office action (3/20/02) included a § 112, 2nd paragraph rejection and § 102 rejection citing Summerell. After a telephone conversation with the examiners on 6/10/02 and achieving what was presented as an agreeable conclusion, the response to the office action was sent on 6/11/02 with the claims essentially the same as today with the exception of the use of the phrase "optimal health profile" which was suggested by the examiners. Because of a change in regulations, a clean and marked-up version of the 6/11/02 response was sent on 6/24/02. A final office action (9/11/02) rejected all claims, the § 102 rejection was withdrawn, but a § 103 rejection was introduced by combining Summerell with Riley and maintaining the same objections. The claims have remained essentially unchanged in concept since the response to the first office action.

(G) The examiners were incorrect when they denied that the appellant never indicated that

there was any vagueness or lack of clear issues regarding the telephone conferences. (Pg. 17 & 18). The applicant recited the details of the telephone interview on June 10, 2002, where the claim amendments that were approved as acceptable by the examiners. The amended response was sent on June 11, 2002, with the understanding that all objections were resolved by amendments to the claims, and were acceptable for allowance. Applicant was disappointed when a final office action and rejection of all claims was sent on September 11, 2002.

The applicant protested the action of the examiners on 10/22/02, questioning the finality of the prosecution when the examiners changed the terms of the agreement of 6/10/02 and changed the grounds for rejection from a §102 to a § 103, and protested the examiners responses as void for vagueness. Appellant cited MPEP § 706.07 which states that “[b]efore final rejection is in order a clear issue should be developed between the examiner and applicant.” That has not happened in this case. No clear issue has been communicated to the applicant from the examiners and this continues to the present. Evidence appendix #1 illustrates the deceptive action of the examiners.

This only difference between what occurred on 6/10/02 and what happened on 2/8/05 is the fact that the examiners put the 2/8/05 agreement in writing.

Conclusion

In view of the foregoing, it is clear that Summerell and Riley, taken alone or in combination, do not express, imply or suggest the invention of claim 1. It is also clear that the examiners have not presented a convincing line of reasoning as to why the artisan would have found the claimed invention to be obvious in light of the teachings of the references. Thus, the examiner has fallen victim to the insidious effect of the hindsight syndrome.

It thus follows that a *prima facie* case of obviousness in the present case has clearly not been established, and that independent claim 1 is therefore clearly patentable. Dependent claims 2-5 are directed to even more details of the specific invention. Therefore, these claims are also in condition for allowance for the reasons indicated above. It is therefore requested that the above rejections be overturned and that claims 1-5 be passed to issue.

Respectfully submitted,


Edward J. Petrus, M.D.
3413 Spanish Oak Dr.
Austin, Texas 78731
Tel: (512)-454-6500
Fax: (512)-453-0066
December 30, 2005

EVIDENCE APPENDIX #1

Interview Summary	Application No.	Applicant(s)	
	09/444,660	PETRUS, EDWARD J.	
	Examiner Rachel L. Porter	Art Unit 3626	

All participants (applicant, applicant's representative, PTO personnel):

- (1) Rachel L. Porter. (3) Edward Petrus, Pro Se Applicant.
 (2) Joseph Thomas, SPE. (4) _____.

Date of Interview: 08 February 2005.

Type: a) Telephonic b) Video Conference
 c) Personal [copy given to: 1) applicant 2) applicant's representative]

Exhibit shown or demonstration conducted: d) Yes e) No.
 If Yes, brief description: _____.

Claim(s) discussed: 1 in particular (all claims of record in general).

Identification of prior art discussed: n/a.

Agreement with respect to the claims f) was reached. g) was not reached. h) N/A.

Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: See Continuation Sheet.

(A fuller description, if necessary, and a copy of the amendments which the examiner agreed would render the claims allowable, if available, must be attached. Also, where no copy of the amendments that would render the claims allowable is available, a summary thereof must be attached.)

THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a reply to the last Office action has already been filed, APPLICANT IS GIVEN ONE MONTH FROM THIS INTERVIEW DATE, OR THE MAILING DATE OF THIS INTERVIEW SUMMARY FORM, WHICHEVER IS LATER, TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW. See Summary of Record of Interview requirements on reverse side or on attached sheet.



JOSEPH THOMAS
 SUPERVISORY PATENT EXAMINER
 TECHNOLOGY CENTER 3600

Examiner Note: You must sign this form unless it is an Attachment to a signed Office action.



Rachel L. Porter
 Examiner's signature, if required

Continuation Sheet (PTOL-413)**Application No. 09/444,660**

Continuation of Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Discussed claim rejections under 112, 1st paragraph and 112,2nd paragraph and proposed amendments to overcome these claim rejections. Examiners indicated that the removal of the phrases "other items covered by the questionnaire" and "other nutritional supplements" from steps c) and d) of claim 1 should be sufficient to overcome the 112, 2nd paragraph rejections of claims 1-5 provided in the Final Rejection mailed 12/22/04. Examiners also indicated that removal of the phrase "for differences in" in the comparing step (c) of claim 1 should be sufficient to overcome the rejection of claims 1-5 under 112,1st paragraph provided in the Final Rejection mailed 12/22/04. Advised Applicant that any amendments to the claims at this stage must be submitted in a formal, signed After-Final written response .

EVIDENCE APPENDIX #2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:) Examiner: Rachel L. Porter
Edward J. Petrus)
Serial No. 09/444,660)
Filed: November 22, 1999) Group Art Unit: 3626

For: Dietary Supplement Selector and Method

RESPONSE TO REJECTION AFTER FINAL

In response to the decision of the examiner mailed on December 22, 2004, please amend the claims as follows:

Claim Amendments:

1. (Currently amended) A method/process of creating a dietary supplement profile for an individual comprising:
 - a) completing a health questionnaire by an individual,
 - b) comparing of the questionnaire information by an individual to a health profile for a person of the individual's age and health history background in a computer data base,
 - c) comparing for differences in the individual's health information to standardized profiles based on age, sex, physical activity, dietary habits, past medical history and other items covered in the questionnaire to achieve optimal health and wellness,
 - d) generating a computer-implemented dietary supplement profile based on the individual's health information listing the vitamins, minerals, amino acids, enzymes, and herbs and other nutritional supplements to achieve optimal health and wellness.
2. (Previously amended) The method/process of creating a dietary supplement profile of claim 1, wherein step (b) comprises comparing the questionnaire information by the individual and information provided by a physical examination to a health profile for a person of the individual's age and health history background in a computer database.
3. (Previously amended) The method/process of creating a dietary supplement

profile of claim 1, wherein step (b) comprises comparing the questionnaire information provided by the individual and information provided by laboratory studies to a health profile for a person of the individual's age and health history background in a computer database.

4. (Previously amended) The method/process of creating a dietary supplement

profile of claim 1, further comprises adding a list of commercially available products that provide the dietary supplements listed to achieve optimal health and wellness.

5. (Original) The method/process of creating a dietary supplement profile of claim 1, further comprises adding a plan for weight management.

REMARKS

1. Claims 1-5 were rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 1-4 were rejected because "there is no direct description of comparing for differences to standardized profiles to achieve optimal health and wellness." In the original description filed on 11/22/1999 the questionnaire information was entered and stored in the computer database "where it is compared to a health profile for a person of the consumer's age and health history background. Based on this comparison, a dietary supplement profile 3 can be generated that calculates the consumers personal nutritional needs of vitamins, minerals, amino acids, enzymes, herbs and other nutritional supplements to achieve optimal health and wellness." (Page 2, lines 12-19). Claim 1(c) was amended to comply with this objection.

2. Claims 1-5 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 was amended to remove the phrases "and other items in the questionnaire" and "and other nutritional supplements." Step b of claim 1 compares the data in the questionnaire to that of

a person of the consumer's age and health history background. Step c of claim 1 compares the differences noted to standardized profiles based on age, sex, physical activity, dietary habits, and past medical history in the computer database. The database for that individual may notice changes from prior data to arrive at a new profile. Claim 2 may note a change in physical signs such as an increase or decrease in blood pressure. Claim 3 may note a change in lab studies such as an increase in CRP.

Claim 4 will then provide a different profile and suggested dietary supplements.

3. Claims 1-5 were rejected under 35 U.S.C. §103(a) as being unpatentable over Summerell et al (USPN 5,937,387) in view of Riley (USPN 5,976,568).

This rejection was thoroughly discussed in the Brief on Appeal pages 6-10 and Reply Brief pages 1-7.

CONCLUSION

For all the above reasons, Applicant submits that the claims are now in proper form, and that the claims all define patentable over the prior art. Applicant submits this application is now in condition for allowance, which action is respectfully petitioned.

Respectfully submitted,



Edward J. Petrus
3413 Spanish Oak Dr.
Austin, Texas 78731
Tel: (512) - 454-6500
Fax: (512) - 453-0066

Applicant Pro Se
February 7, 2005

EVIDENCE APPENDIX - 3

U.S. Patent

Aug. 10, 1999

Sheet 1 of 30

5,937,387

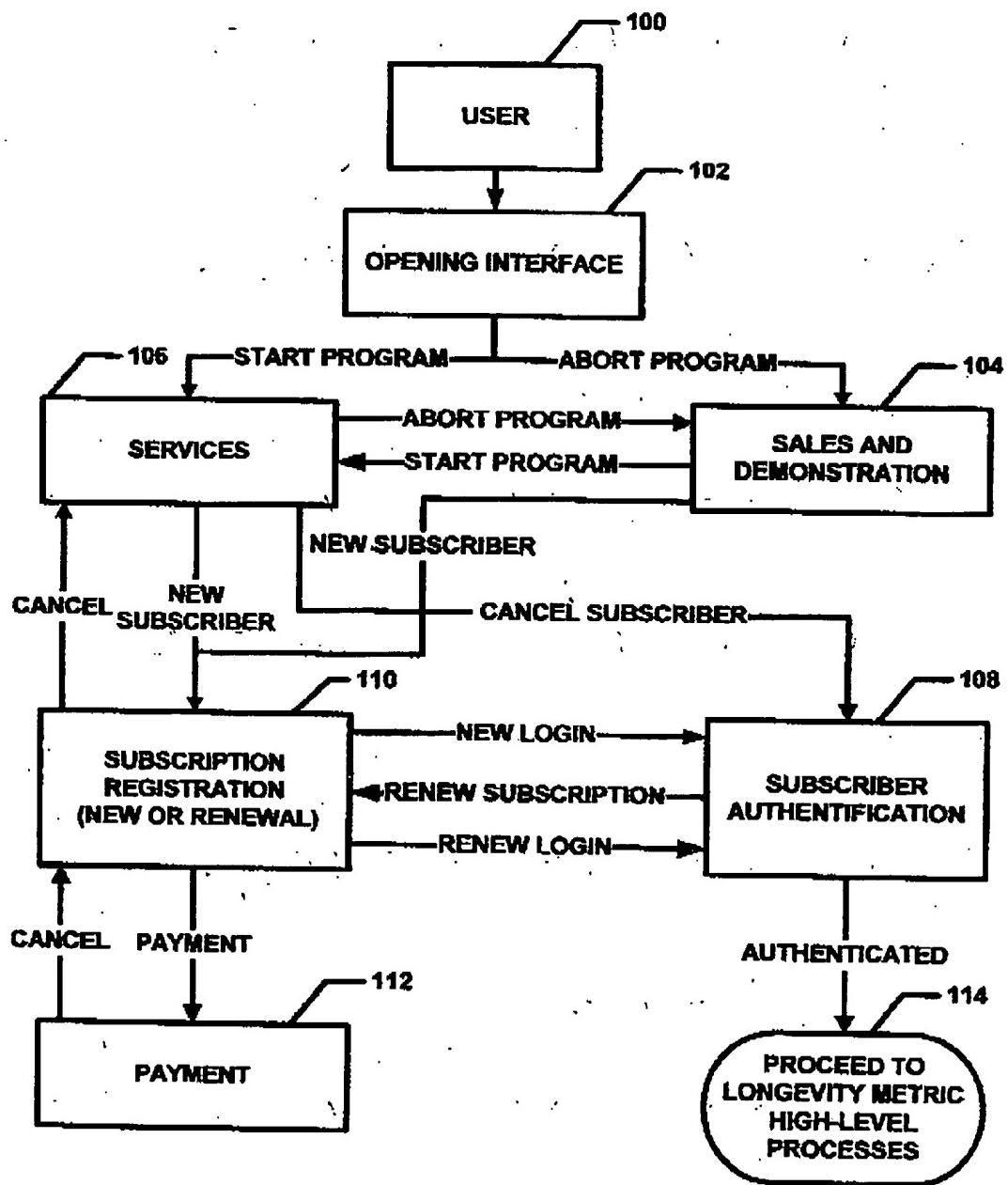


FIGURE 1

U.S. Patent

Aug. 10, 1999

Sheet 18 of 30

5,937,387

Physiological Age: 46.77 Calendar Age: 46.90

Wellness Planner

Select	Recommendations*	Maximum Age Reduction (years)**
<input type="radio"/>	Cigarette Smoking: Commit to stop smoking or if you already have keep up the good work.	2.75
<input type="radio"/>	Cholesterol and HDL: If cholesterol is high or your HDL is low reduce your dietary cholesterol, exercise and have 1 alcoholic drink a night.	1.52
<input type="radio"/>	Blood Pressure: Reduce your blood pressure to LESS than 120/80.	1.24
<input type="radio"/>	Stress: Learn methods to reduce your stress level and do them routinely.	1.22
<input type="radio"/>	Stamina: Do exercises that raise your heart rate to 70% of maximum ((220 minus your age) multiplied by 0.70) for 60 minutes per week.	1.13

with this plan:	Physiological Age	Calendar Age
90 days from now:	46.77	47.15
3 years from now:	46.77	49.90

 Exit and Print

Previous ⇠ Next ⇢

*Consult your doctor before starting any Wellness plan. **Maximum age benefit in years younger if this were the only Wellness recommendation you did.

FIGURE 18.

U.S. Patent

Aug. 10, 1999

Sheet 19 of 30

5,937,387**Physiological Age: 46.77 Calendar Age: 46.90****Wellness Planner**

Select	Recommendations*	Maximum Age Reduction (years)**
<input type="radio"/>	Vitamin C: Take 250 mg (or the dietary equivalent) of Vitamin C, 3 times per day.	0.64
<input type="radio"/>	Folate: Take more than 670 micrograms (mcg) and up to 1 milligram (mg) per day.	0.42
<input type="radio"/>	Body Mass Index: Carefully begin a sustainable weight loss program.	0.42
<input type="radio"/>	Heart Rate: Increase your stamina activity.	0.28
<input type="radio"/>	Vitamin E: Take 400 I.U. per day of vitamin E.	0.25

with this plan:	Physiological Age	Calendar Age
90 days from now:	46.77	47.15
3 years from now:	46.77	49.90

 Exit and Print

Previous ⇠ Next ⇢

* Consult your doctor before starting any Wellness plan. **Maximum age benefit in years younger if this were the only Wellness recommendation you did.

FIGURE 19.

U.S. Patent

Aug. 10, 1999

Sheet 22 of 30

5,937,387

5471 South Drexel Street
 First Floor
 Chicago, IL, 60657

**Bob Barker's
 Wellness Planner**

Session Date	2/7/97
Calendar	46.9
Page:	1

Physiological Age: 46.8
With this Wellness Plan:
90 Day Target:¹ 43.5
This Location: **Long Term Target:¹** 40.0



You've chosen to follow 6 recommendations to help reduce your Physiological Age.
 Reach your 90 Day Target by following all selected recommendations for the next three months. Actions that have the biggest impact on your Wellness appear first.

Recommendation²	Maximum Physiological Age Reduction (years younger)³
1. Cigarette Smoking: Commit to stop smoking or if you already have keep up the good work.	2.8
2. Cholesterol and HDL: If cholesterol is high or your HDL is low reduce your dietary cholesterol, exercise and have 1 alcoholic drink a night.	1.5
3. Blood Pressure: Reduce your blood pressure to LESS than 120/80.	1.2
4. Vitamin C: Take 250 mg (or the dietary equivalent) of Vitamin C, 3 times per day.	0.6
5. Folate: Take more than 670 micrograms (mcg) and up to 1 milligram (mg) per day.	0.4
6. Vitamin E: Take 400 I.U. per day of vitamin E.	0.3

¹ Plus time since date of this report.

² Consult your doctor before starting any age reduction strategy.

³ Maximum age reduction benefit in years younger if this were the only age reduction strategy you did — Wellness strategies interact so combined benefit may be greater or less for you.

Questions or Comments?

FIGURE 22

DIETARY SUPPLEMENT PROFILE

Name: John Consumer
 Age: 60 DOB: 11/06/39 Sex: M
 Weight: 200 lbs
 Height: 5'11"
 Date:

The following daily dietary supplements are recommended:

Vitamin A (retinyl acetate)	12,500 IU
Beta-Carotene	10,000 IU
Vitamin B ₁ (thiamine)	30 mg.
Vitamin B ₂ (riboflavin)	30 mg
Vitamin B ₃ (niacinamide)	90 mg.
Vitamin B ₅ (pantothenic acid)	20 mg.
Vitamin B ₆ (pyridoxal-5-phosphate)	30 mg.
Vitamin B ₁₂ (cyanocobalamine)	200 mcg.
Biotin (d-biotin)	300 mcg.
Choline (choline bitartrate)	20 mg.
Folic acid	800 mcg.
Vitamin C (ascorbic acid)	300 mg
Vitamin D (cholecalciferol)	100 IU
Vitamin E (d- α -tocopherol)	200 IU
Vitamin K (phytonadione)	60 mcg.
Boron (boron asparate)	3 mg.
Calcium (calcium citrate)	400 mg.
Chromium (chromium aspartate)	20 mcg.
Copper (copper aspartate)	250 mcg.
Iodine (kelp)	150 mcg.
Iron	-0-
Magnesium (magnesium citrate)	300 mg.
Manganese (manganese citrate)	15 mg.
Molybdenum (molybdenum chelate)	45 mcg.
Potassium (potassium citrate)	90 mg.
Selenium (l-selenomethionine)	150 mcg.
Vanadium (vanadium chelate)	50 mcg.
Zinc (zinc citrate)	30 mg.

FIG. 2